

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

Case No. 14-CV-03022 (VEB)

DALE ALDERMAN,

Plaintiff,

vs.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

Defendant.

DECISION AND ORDER

**I. INTRODUCTION**

In September of 2010, Plaintiff Dale Alderman applied for supplemental security income (“SSI”) benefits under the Social Security Act. The Commissioner of Social Security denied the application.

1 Plaintiff, represented by D. James Tree, Esq., commenced this action seeking  
2 judicial review of the Commissioner's denial of benefits pursuant to 42 U.S.C. §§  
3 405 (g) and 1383 (c)(3). The parties consented to the jurisdiction of a United States  
4 Magistrate Judge. (Docket No. 8).

5 On October 30, 2014, the Honorable Rosanna Malouf Peterson, Chief United  
6 States District Judge, referred this case to the undersigned pursuant to 28 U.S.C. §  
7 636(b)(1)(A) and (B). (Docket No. 17).

## 8 9 **II. BACKGROUND**

10 The procedural history may be summarized as follows:

11 Plaintiff applied for SSI benefits on September 27, 2010. (T at 144-50).<sup>1</sup> The  
12 application was denied initially and on reconsideration and Plaintiff requested a  
13 hearing before an Administrative Law Judge ("ALJ"). On September 18, 2012, a  
14 hearing was held before ALJ Kimberly Boyce. (T at 32). Plaintiff appeared with his  
15 attorney and testified. (T at 40-53). The ALJ also received testimony from Trevor  
16 Duncan, a vocational expert. (T at 53-57).

17 On October 10, 2012, ALJ Boyce issued a written decision denying the  
18 application for benefits and finding that Plaintiff was not disabled within the

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19 <sup>1</sup> Citations to ("T") refer to the administrative record at Docket No. 12.

1 meaning of the Social Security Act. (T at 16-31). The ALJ's decision became the  
2 Commissioner's final decision on February 5, 2014, when the Appeals Council  
3 denied Plaintiff's request for review. (T at 1-6).

4 On February 26, 2014, Plaintiff, acting by and through his counsel, timely  
5 commenced this action by filing a Complaint in the United States District Court for  
6 the Eastern District of Washington. (Docket No. 5). The Commissioner interposed  
7 an Answer on May 2, 2014. (Docket No. 11).

8 Plaintiff filed a motion for summary judgment on October 17, 2014. (Docket  
9 No. 15). The Commissioner moved for summary judgment on December 1, 2014.  
10 (Docket No. 21). Plaintiff filed a reply memorandum of law on December 15, 2014.  
11 (Docket No. 25).

12 For the reasons set forth below, the Commissioner's motion is denied,  
13 Plaintiff's motion is granted, and this case is remanded for further proceedings.  
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### III. DISCUSSION

#### A. Sequential Evaluation Process

The Social Security Act (“the Act”) defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff’s age, education and work experiences, engage in any other substantial work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§

1 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination of impairments,  
3 the disability claim is denied. If the impairment is severe, the evaluation proceeds to  
4 the third step, which compares plaintiff's impairment with a number of listed  
5 impairments acknowledged by the Commissioner to be so severe as to preclude  
6 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20  
7 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
8 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
9 not one conclusively presumed to be disabling, the evaluation proceeds to the fourth  
10 step, which determines whether the impairment prevents plaintiff from performing  
11 work which was performed in the past. If a plaintiff is able to perform previous work  
12 that plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
13 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity (RFC) is  
14 considered. If plaintiff cannot perform past relevant work, the fifth and final step in  
15 the process determines whether plaintiff is able to perform other work in the national  
16 economy in view of plaintiff's residual functional capacity, age, education and past  
17 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*  
18 *Yuckert*, 482 U.S. 137 (1987).

1 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
2 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
3 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
4 met once plaintiff establishes that a mental or physical impairment prevents the  
5 performance of previous work. The burden then shifts, at step five, to the  
6 Commissioner to show that (1) plaintiff can perform other substantial gainful  
7 activity and (2) a “significant number of jobs exist in the national economy” that  
8 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

9 **B. Standard of Review**

10 Congress has provided a limited scope of judicial review of a Commissioner’s  
11 decision. 42 U.S.C. § 405(g). A Court must uphold a Commissioner’s decision,  
12 made through an ALJ, when the determination is not based on legal error and is  
13 supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir.  
14 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). “The [Commissioner’s]  
15 determination that a plaintiff is not disabled will be upheld if the findings of fact are  
16 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir.  
17 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,  
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n 10 (9<sup>th</sup> Cir. 1975), but less than a  
19 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989).

1 Substantial evidence “means such evidence as a reasonable mind might accept as  
2 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401  
3 (1971)(citations omitted). “[S]uch inferences and conclusions as the [Commissioner]  
4 may reasonably draw from the evidence” will also be upheld. *Mark v. Celebreeze*,  
5 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the Court considers the record as a  
6 whole, not just the evidence supporting the decision of the Commissioner. *Weetman*  
7 *v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525,  
8 526 (9<sup>th</sup> Cir. 1980)).

9 It is the role of the Commissioner, not this Court, to resolve conflicts in  
10 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
11 interpretation, the Court may not substitute its judgment for that of the  
12 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
13 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
14 set aside if the proper legal standards were not applied in weighing the evidence and  
15 making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
16 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
17 administrative findings, or if there is conflicting evidence that will support a finding  
18 of either disability or nondisability, the finding of the Commissioner is conclusive.  
19 *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9<sup>th</sup> Cir. 1987).

1 **C. Commissioner's Decision**

2 The ALJ found that Plaintiff had not engaged in substantial gainful activity  
3 since September 27, 2010, the alleged onset date. (T at 21). The ALJ determined that  
4 Plaintiff's hypertension, chronic obstructive pulmonary disease, and degenerative  
5 disc disease were "severe" impairments under the Act. (Tr. 21-22).

6 However, the ALJ concluded that Plaintiff did not have an impairment or  
7 combination of impairments that met or medically equaled one of the impairments  
8 set forth in the Listings. (T at 22). The ALJ determined that Plaintiff retained the  
9 residual functional capacity ("RFC") to perform light work as defined in 20 CFR §  
10 416.967 (b). The ALJ found that Plaintiff could not climb ladders, ropes, and  
11 scaffold, and was limited to occasional stair climbing and stooping. (T at 22-25).

12 The ALJ concluded that Plaintiff could not perform any past relevant work. (T  
13 at 25). However, considering Plaintiff's age (51 on the alleged onset date), education  
14 (high school), work experience, and RFC (light work), the ALJ determined that there  
15 were jobs that exist in significant numbers in the national economy that Plaintiff can  
16 perform. (T at 26-27).

17 As such, the ALJ concluded that Plaintiff had not been disabled, as defined  
18 under the Act, from September 27, 2010 (the alleged onset date), through October  
19 10, 2012 (the date of the ALJ's decision) and was therefore not entitled to benefits.



(Tr. 27). As noted above, the ALJ's decision became the Commissioner's final decision when the Appeals Council denied Plaintiff's request for review. (Tr. 1-6).

#### **D. Plaintiff's Arguments**

Plaintiff contends that the Commissioner's decision should be reversed. He offers five (5) principal arguments in support of this position. First, Plaintiff argues that the ALJ erred by finding that his heart condition was not a severe impairment. Second, Plaintiff contends the ALJ committed reversible error by discounting the opinion of Dr. Fady Sabry, a treating physician. Third, he asserts that the ALJ improperly rejected other medical opinions of record. Fourth, Plaintiff challenges the ALJ's credibility determination. Fifth, he contends that the ALJ's step five analysis was flawed. This Court will address each argument in turn.

##### **1. Step Two Severity Analysis**

At step two of the sequential evaluation process, the ALJ must determine whether the claimant has a "severe" impairment. See 20 C.F.R. §§ 404.1520(c), 416.920(c). The fact that a claimant has been diagnosed with and treated for a medically determinable impairment does not necessarily mean the impairment is "severe," as defined by the Social Security Regulations. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). To establish severity, the evidence must show the diagnosed impairment

1 significantly limits a claimant's physical or mental ability to do basic work activities  
2 for at least 12 consecutive months. 20 C.F.R. § 416.920(c).

3 The claimant bears the burden of proof at this stage and the “severity  
4 requirement cannot be satisfied when medical evidence shows that the person has  
5 the ability to perform basic work activities, as required in most jobs.” SSR 85-28.  
6 Basic work activities include: “walking, standing, sitting, lifting, pushing, pulling,  
7 reaching, carrying, or handling; seeing, hearing, speaking; understanding, carrying  
8 out and remembering simple instructions; responding appropriately to supervision,  
9 coworkers, and usual work situation.” *Id.*

10 In the present case, Plaintiff had aortic porcine valve replacement valve  
11 surgery in 1991. (T at 418). In 1998, the porcine valve was replaced in a second  
12 surgery. (T at 418). As noted above, the ALJ determined that Plaintiff’s  
13 hypertension, chronic obstructive pulmonary disease, and degenerative disc disease  
14 were “severe” impairments under the Act. (Tr. 21-22). However, the ALJ concluded  
15 that Plaintiff’s aortic valve replacement was not a severe impairment. (T at 22).

16 The ALJ committed reversible error. The step two analysis is a screening  
17 device designed to dispose of *de minimis* complaints. *Smolen v. Chater*, 80 F.3d  
18 1273, 1290 (9th Cir. 1996). “[A]n impairment is found not severe . . . when medical  
19 evidence establishes only a slight abnormality or a combination of slight

1 abnormalities which would have no more than a minimal effect on an individual's  
2 ability to work." *Yuckert v. Bowen*, 841 F.2d 303 (9th Cir. 1988) (quoting SSR 85-  
3 28).

4 Here, two treating physicians and a treating provider assessed significant,  
5 long-term limitations arising from Plaintiff's aortic valve replacements.

6 In August of 2003, Dr. V. Shad, a treating physician, opined that Plaintiff had  
7 a "lifelong" limitation to sedentary work as a result of his heart condition. (T at 519-  
8 20). In July of 2007, Dr. Fady Sabry, another treating physician, completed a  
9 physical evaluation, in which he opined that Plaintiff had moderate limitation  
10 (defined as "significant interference") with regard to all basic work-related activities  
11 as a result of his heart condition. (T at 548). Dr. Sabry concluded that Plaintiff was  
12 limited to sedentary work and that this restriction would last at least 12 months. (T at  
13 548-49). Dr. Sabry reiterated these findings in an evaluation conducted in January  
14 of 2008. (T at 554-55). In December of 2008, Dr. Sabry opined that Plaintiff could  
15 not even perform sedentary work and characterized his overall work level as  
16 "severely limited." (T at 574).

17 In October of 2009, Kelli Campbell, a nurse practitioner working in  
18 collaboration with Dr. Sabry, noted Plaintiff's diagnosis of chronic obstructive  
19 pulmonary disorder ("COPD"), chronic back pain, and aortic valve disorder. (T at

1 576). Ms. Campbell opined that Plaintiff was limited to sedentary work and that the  
2 limitations were permanent. (T at 577). In September of 2011, Dr. Sabry noted that  
3 Plaintiff had “multiple medical problems,” which would require him to lie down for  
4 15-30 minutes during the day due to shortness of breath and which would likely  
5 cause him to miss 4 or more days per month of work. (T at 416).

6 In addition, Dr. Robert Hoskins, a non-examining State Agency review  
7 consultant, identified Plaintiff’s heart condition as a severe impairment. (T at 75).

8 The ALJ did not address any of these opinions in her step two analysis. (T at  
9 21). In fact, the step two analysis of Plaintiff’s aortic valve replacements is limited  
10 to a single paragraph, consisting of three (3) sentences. (T at 22). In sum, the ALJ  
11 found that the heart condition was not a severe impairment because it did not  
12 significantly restrict Plaintiff’s ability to do basic work activities. The only evidence  
13 cited in support of this proposition was that Plaintiff “performs activities of daily  
14 living despite his heart valve replacement.” (T at 22).

15 This analysis is insufficient. First, Plaintiff’s activities of daily living, without  
16 more, do not establish that his heart condition has no more than a minimal effect on  
17 his ability to perform basic work activities. Plaintiff performs some child care  
18 activities, prepares simple meals, engages in basic household chores and yard work,  
19 and spends most days watching television, reading, and listening to music. (T at 48,

1 50, 172, 188, 190). These activities are not a sufficient basis on which to conclude  
2 that Plaintiff's heart condition was a non-severe impairment.

3 "The Social Security Act does not require that claimants be utterly  
4 incapacitated to be eligible for benefits, and many home activities are not easily  
5 transferable to what may be the more grueling environment of the workplace, where  
6 it might be impossible to periodically rest or take medication." *Fair v. Bowen*, 885  
7 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

8 "The critical differences between activities of daily living and activities in a  
9 full-time job are that a person has more flexibility in scheduling the former than the  
10 latter, can get help from other persons..., and is not held to a minimum standard of  
11 performance, as she would be by an employer. The failure to recognize these  
12 differences is a recurrent, and deplorable, feature of opinions by administrative law  
13 judges in social security disability cases." *Bjornson v. Astrue*, 671 F.3d 640, 647 (7<sup>th</sup>  
14 Cir. 2012) (cited with approval in *Garrison v. Colvin*, 759 F.3d 995, 1016 (9<sup>th</sup> Cir.  
15 2014)).

16 In addition, and more importantly, the ALJ was obliged (and failed) to address  
17 all of the pertinent medical evidence, including opinions from treating providers, to  
18 the effect that Plaintiff was significantly limited by his heart condition.

1 In disability proceedings, a treating physician's opinion carries more weight  
2 than an examining physician's opinion, and an examining physician's opinion is  
3 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,  
4 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.  
5 1995). If the treating or examining physician's opinions are not contradicted, they  
6 can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If  
7 contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons  
8 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d  
9 1035, 1043 (9th Cir. 1995).

10 "Where an ALJ does not explicitly reject a medical opinion or set forth  
11 specific, legitimate reasons for crediting one medical opinion over another, he errs.  
12 In other words, an ALJ errs when he rejects a medical opinion or assigns it little  
13 weight while doing nothing more than ignoring it, asserting without explanation that  
14 another medical opinion is more persuasive, or criticizing it with boilerplate  
15 language that fails to offer a substantive basis for his conclusion." *Garrison*, 759  
16 F.3d at 1012.

17 As noted above, Dr. Shad and Dr. Sabry, both treating physicians, found  
18 significant work-related limitations arising from Plaintiff's heart impairment. (T at  
19 519-20, 548-49, 554, 574). The ALJ did not expressly address these opinions in the

1 step two analysis. This Court is mindful that these assessments were made before  
2 the alleged onset date.<sup>2</sup> In her decision (albeit not in the step two section), the ALJ  
3 made general reference to the fact that “[s]ignificant parts of the medical evidence  
4 [were] dated well before” the alleged onset date. (T at 23). However, this general  
5 reference was not a sufficient analysis of the treating physicians’ opinions.

6 “While evidence pre-dating a claimant's alleged onset date may be of limited  
7 relevance in determining whether that claimant is disabled after his alleged onset  
8 date, such evidence is not automatically irrelevant to determining disability during  
9 the period at issue.” *Manteau v. Colvin*, No. 12-1153, 2013 U.S. Dist. LEXIS 49266,  
10 2013 WL 1390018, at \*4 (C.D. Cal. April 4, 2013). Moreover, a two-time heart  
11 valve replacement has an element of seriousness and permanency to it that suggests  
12 a long-term, persistent problem clearly counseled by Claimant’s doctors. The  
13 Commissioner has a duty to develop the claimant’s complete medical history for at  
14 least twelve months preceding the month in which the application is filed “unless

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15 <sup>2</sup> In the original application, Plaintiff alleged an onset date of August 15, 1997. (T at 144). During  
16 the administrative hearing, his counsel conceded that the relevant alleged onset date was, for  
17 practical purposes, September 27, 2010, the protective filing date. (T at 35-36). (SSI benefits are  
18 not awarded retroactively. As such, as a practical matter, the earliest disability date that may be  
19 claimed for purposes of SSI benefits is the protective filing date of a claimant's application. *See* 20  
C.F.R. § 416.501). Although September 27, 2010 is therefore the legally relevant onset date, it is  
not logically inconsistent for Plaintiff to point to evidence that he had a permanently disabling  
condition that arose prior to that date.

1 there is a reason to believe that development of an earlier period is necessary.” 20  
2 C.F.R. § 416.912(d) “This duty exists even when the claimant is represented by  
3 counsel.” *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983).

4 Here, both Dr. Shad and Dr. Sabry assessed long-term (indeed, permanent)  
5 limitations related to Plaintiff’s heart condition. At a minimum, consideration (and  
6 explicit discussion) of this evidence was necessary prior to reaching the conclusion  
7 that Plaintiff’s heart condition imposed no more than a minimal effect on his ability  
8 to perform basic work activities. Moreover, the ALJ found the assessment of Dr.  
9 Hoskins (the non-examining review consultant) “generally accurate” (T at 25), but  
10 did not reconcile her step two finding with Dr. Hoskins’s conclusion that Plaintiff’s  
11 heart condition was a severe impairment. (T at 75).

12 For the foregoing reasons, this Court finds that a remand is necessary for the  
13 ALJ to reconsider the step two analysis and, in particular, discuss what weight  
14 should be afforded to the evidence related to Plaintiff’s heart condition. Although  
15 some of that evidence pre-dated the protective filing date, it referenced a long-term  
16 condition and should have been addressed.

## 17 **2. Treating Physician’s Opinion**

18 In October of 2010, Dr. Sabry, a treating physician, opined that Plaintiff could  
19 stand for 3-4 hours in an 8-hour work day, sit for 4 hours in an 8-hour work day, and  
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1 lift 10 pounds occasionally. (T at 380). In June of 2011, he completed an assessment  
2 indicating that Plaintiff's condition was deteriorating and that he could only stand  
3 for 1 hour in an 8-hour workday, sit for 4 hours in an 8-hour workday, and could lift  
4 10 pounds occasionally. (T at 641). In September of 2011, Dr. Sabry noted that  
5 Plaintiff had "multiple medical problems," which would require him to lie down for  
6 15-30 minutes during the day due to shortness of breath and which would likely  
7 cause him to miss 4 or more days per month of work. (T at 416).

8 The ALJ discounted the September 2011 report, but made no reference to the  
9 earlier opinions. (T at 25). The ALJ found Dr. Sabry's September 2011 opinion  
10 inconsistent with the medical evidence, but it is not clear whether (or how) the ALJ  
11 reconciled this finding with the evidence related to Plaintiff's heart condition  
12 (discussed above). Further, Dr. Sabry's clinical notes (T at 625, 629) were consistent  
13 with his findings and the opinions provided by Dr. Shad and Ms. Campbell. The  
14 ALJ neglected to discuss this fact and (as noted above) did not address Dr. Sabry's  
15 earlier assessments.

16 In addition, the ALJ described Dr. Sabry's findings as "grossly exaggerate[d]"  
17 and noted that the September 2011 assessment was made in the context of an  
18 evaluation submitted to the State Department of Social and Health Services. (T at  
19 25). However, the "purpose for which medical reports are obtained does not provide

1 a legitimate basis for rejecting them” unless there is evidence demonstrating  
2 impropriety, and the ALJ identified no evidence of any impropriety by Dr. Sabry.  
3 *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995); *see also Reddick v. Chater*, 157  
4 F.3d 715, 726 (9th Cir. 1998).

5 The ALJ afforded greater weight to the opinions of several non-treating  
6 physicians (Dr. Rode, Dr. Dove, and Dr. Hoskins). (T at 25). Dr. Stephen Rode  
7 conducted a consultative examination in April of 2011. He opined that Plaintiff  
8 could stand/walk for 6-8 hours at one time without interruption, sit for 6-8 hours at  
9 one time without interruption, and lift 50 pounds occasionally and 25 pounds  
10 frequently. (T at 411). However, Dr. Rode’s report contained a list of medical  
11 reports reviewed (T at 407), which did not include the assessments discussed above  
12 concerning Plaintiff’s heart condition. In addition, Dr. Rode’s opinion was  
13 formulated prior to Dr. Sabry’s June 2011 assessment that Plaintiff’s condition was  
14 “deteriorating.”<sup>3</sup>

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17 <sup>3</sup> This case presents an odd scenario in which there is evidence of a permanent, significant  
18 impairment, although much of that evidence pre-dates the alleged onset date. Then, there are  
19 medical opinions (Dr. Hoskins, Dr. Rode) suggesting that Plaintiff can engage in fairly strenuous  
20 physical activity. One explanation might be medical improvement, but that is contradicted by Dr.  
Sabry’s conclusion that Plaintiff was “deteriorating.” As explained further in Section D below, this  
conflicting evidence must be reviewed and reconciled on remand.

1 Dr. Hoskins was a non-examining review consultant, who opined that Plaintiff  
2 could stand/walk for about 6 hours in an 8-hour workday, sit for 6 hours in an 8-hour  
3 workday, and lift 10 pounds frequently and 20 pounds occasionally. (T at 76).  
4 However, the opinion of a non-examining, State Agency physician does not, without  
5 more, justify the rejection of an examining physician's opinion. *Lester v. Chater*, 81  
6 F.3d 821, 831 (9<sup>th</sup> Cir. 1995)(citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th  
7 Cir. 1990)). The rejection of an examining physician opinion based on the testimony  
8 of a non-examining medical consultant may be proper, but only where there are  
9 sufficient reasons to reject the examining physician opinion independent of the non-  
10 examining physician's opinion. *See e.g., Lester*, 81 F.3d at 831; *Roberts v. Shalala*,  
11 66 F.3d 179 (9th Cir. 1995). Further, as noted above, Dr. Hoskins found  
12 Plaintiff's heart condition to be a severe impairment (T at 75), a finding the ALJ  
13 ignored with regard to the step two analysis.

14 In a June 2012 treatment note, Dr. Phillip Dove, a treating physician,  
15 described Plaintiff's hypertension as "improving" with medication. (T at 673). He  
16 recommended weight loss and smoking cessation. (T at 676). However, Dr. Dove  
17 made no functional limitation findings and, thus, his opinion cannot be cited in  
18 support of the ALJ's decision.

1 In light of the foregoing, this Court finds the ALJ's decision to discount Dr.  
2 Sabry's opinions from the relevant time period flawed and not supported by  
3 substantial evidence.

### 4 **3. Dr. Dalton's Opinion**

5 In October of 2010, Dr. J. Dalton reviewed Plaintiff's records and approved  
6 an award of state disability benefits (known as "GAX") due to episodes of fatigue  
7 related to his aortic valve replacement. Dr. Dalton opined that Plaintiff was limited  
8 to sedentary work, which (given his age) rendered him disabled under the Social  
9 Security disability standards. (T at 620). The ALJ dismissed this opinion, without  
10 any detailed discussion, on the grounds that it was inadequately supported. (T at 25).  
11 However, Dr. Dalton's conclusion was consistent with much of the evidence  
12 outlined above (including, in particular, the opinions of Dr. Shad, Dr. Sabry, and Ms.  
13 Campbell). Because the ALJ failed to provide a sufficient discussion of that  
14 evidence, it is not clear how she reconciled it with the decision to discount Dr.  
15 Dalton's assessment. This was further error on the part of the ALJ.

### 16 **4. Credibility**

17 A claimant's subjective complaints concerning his or her limitations are an  
18 important part of a disability claim. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
19 1190, 1195 (9<sup>th</sup> Cir. 2004)(citation omitted). The ALJ's findings with regard to the  
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1 claimant's credibility must be supported by specific cogent reasons. *Rashad v.*  
2 *Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent affirmative evidence of  
3 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
4 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). "General  
5 findings are insufficient: rather the ALJ must identify what testimony is not credible  
6 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834;  
7 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

8 In this case, the ALJ found that Plaintiff's medically determinable  
9 impairments could reasonably be expected to cause the alleged symptoms, but that  
10 his statements concerning the intensity, persistence, and limiting effects were not  
11 credible to the extent alleged. (T at 23). The ALJ's decision was flawed.

12 For example, the ALJ cited Plaintiff's acceptance of TANF (Temporary  
13 Assistance of Needy Families) benefits as evidence of dishonesty, on the theory that  
14 the benefits were paid because Plaintiff claimed to be providing childcare during a  
15 period when he claimed he could not work. (T at 23). Plaintiff disputes this  
16 understanding of TANF benefits, arguing that, under certain circumstances, such  
17 benefits can be awarded to disabled caregivers. The Commissioner does not dispute  
18 this argument and the ALJ did not ask Plaintiff for any details regarding his benefit  
19 eligibility. (T at 44). Further, Plaintiff testified that he received TANF benefits in

1 2000 or 2001. (T at 44). The ALJ was quick to dismiss evidence that pre-dated the  
2 alleged onset date when it supported Plaintiff's claim (i.e. the evidence outlined  
3 above concerning Plaintiff's heart condition), but then used such archival evidence  
4 to discount his credibility.

5 In addition, the ALJ's decision to discount Plaintiff's credibility is impacted  
6 by the failure to conduct a proper step two analysis and give appropriate  
7 consideration to Dr. Sabry's opinions. The ALJ cited Plaintiff's "long history" of a  
8 "lack of motivation to work" (T at 25), but then did not reconcile this finding with,  
9 for example, Dr. Shad's conclusion that Plaintiff had a "lifelong" work-related  
10 limitation as a result of his heart condition. (T at 519-20). The ALJ's credibility  
11 assessment must therefore likewise be revisited on remand.

## 12 **5. Step Five Analysis**

13 At step five of the sequential evaluation, the burden is on the Commissioner to  
14 show that (1) the claimant can perform other substantial gainful activity and (2) a  
15 "significant number of jobs exist in the national economy" which the claimant can  
16 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). If a claimant cannot  
17 return to his previous job, the Commissioner must identify specific jobs existing in  
18 substantial numbers in the national economy that the claimant can perform. See  
19 *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.1995). The Commissioner may

1 carry this burden by “eliciting the testimony of a vocational expert in response to a  
2 hypothetical that sets out all the limitations and restrictions of the claimant.”  
3 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.1995).

4 The ALJ's depiction of the claimant's disability must be accurate, detailed, and  
5 supported by the medical record. *Gamer v. Secretary of Health and Human Servs.*,  
6 815 F.2d 1275, 1279 (9th Cir.1987). “If the assumptions in the hypothetical are not  
7 supported by the record, the opinion of the vocational expert that claimant has a  
8 residual working capacity has no evidentiary value.” *Gallant v. Heckler*, 753 F.2d  
9 1450, 1456 (9<sup>th</sup> Cir. 1984).

10 Here, the ALJ’s step five analysis was based on testimony from Trevor  
11 Duncan, a vocational expert. (T at 26). However, the hypotheticals presented to Mr.  
12 Duncan were incomplete. Dr. Hoskins opined that Plaintiff needed to avoid  
13 concentrated exposure to fumes, odors, dusts, gases, and poor ventilation. (T at 77).  
14 The ALJ assigned significant weight to Dr. Hoskins’s opinion (T at 24), but did not  
15 include this limitation in the RFC determination or the hypothetical. It is not clear  
16 why the ALJ omitted this limitation from the hypothetical, especially since she  
17 found Plaintiff’s COPD to be a severe impairment. (T at 21-22).

18 In addition, Dr. Sabry opined that Plaintiff’s “multiple medical problems”  
19 would likely cause him to miss 4 or more days per month of work. (T at 416). The  
20

1 vocational expert testified that this degree of absenteeism would preclude  
2 employment. (T at 55-56). If the ALJ had properly considered and rejected Dr.  
3 Sabry's opinion (which included that limitation), this response would not be  
4 problematic (because the ALJ would not have been obliged to include that  
5 limitation). However, as set forth above, the ALJ's decision to discount Dr. Sabry's  
6 opinion was not supported by substantial evidence and, thus, the step five analysis is  
7 likewise flawed.

#### 8 **D. Remand**

9 In a case where the ALJ's determination is not supported by substantial  
10 evidence or is tainted by legal error, the court may remand the matter for additional  
11 proceedings or an immediate award of benefits. Remand for additional proceedings  
12 is proper where (1) outstanding issues must be resolved, and (2) it is not clear from  
13 the record before the court that a claimant is disabled. *See Benecke v. Barnhart*, 379  
14 F.3d 587, 593 (9th Cir. 2004).

15 Here, this Court finds that a remand for further proceedings is warranted.  
16 Much of the evidence regarding Plaintiff's heart condition does pre-date the  
17 protective filing date and there is arguably some evidence of improvement. The  
18 ALJ's credibility analysis was flawed, but there were legitimate reasons for  
19 questioning Plaintiff's credibility (including a lengthy criminal history). Dr. Stephen



1 Rode, the consultative examiner, rendered an opinion generally consistent with the  
2 ALJ's RFC determination, albeit without a fully developed medical record. As such,  
3 this Court finds that a remand for further proceedings is warranted. The ALJ should  
4 revisit the step two findings concerning Plaintiff's heart condition, reconsider Dr.  
5 Sabry's opinions, and then review the credibility and step five analysis.

6 **IV. ORDERS**

7 IT IS THEREFORE ORDERED that:

8 Plaintiff's motion for summary judgment, Docket No. 15, is GRANTED.

9 The Commissioner's motion for summary judgment, Docket No. 21, is  
10 DENIED.

11 This case is REMANDED for further proceedings.

12 The District Court Executive is directed to file this Order, provide copies to  
13 counsel, enter judgment in favor of Plaintiff, and close this case.

14 DATED this 14<sup>th</sup> day of January, 2015.

15  
16 /Victor E. Bianchini  
17 VICTOR E. BIANCHINI  
18 UNITED STATES MAGISTRATE JUDGE  
19  
20